

CLAIM SUMMARY / DETERMINATION

Claim Number:	B14018-0001
Claimant:	Newton B. Washburn Environmental Services LLC
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	[REDACTED]
Amount Requested:	\$4,424.66

FACTS:

Incident:

On 27 July 2014, United States Coast Guard (USCG) Sector Southeastern New England, (SENE), received notification from Coast Guard Station Castle Hill that an overturned 40 foot vessel was tied off to the pier at the Warren Town Wharf with approximately 300 gallons of oil in the fuel tanks. According to the United States Coast Guard Case report # 693182, the vessel was emanating a sheen into the Warren River, a navigable waterway of the US.¹

On 27 July 2014, Sector SENE Pollution Responder arrived on scene to the Warren Town Wharf and met with the owner of the vessel, the Warren Harbor Master, and Rhode Island Department of Emergency Management (RI DEM) in order to access the situation. The Coast Guard spoke with the vessel owner who stated he had no insurance but was going to attempt to refloat the vessel.

On 28 July 2014, Sector SENE Petty Officer [REDACTED] in his capacity as the Federal On Scene Coordinator's Representative (FOSCR) observed the vessel owner and crew attempt to refloat the vessel which was unsuccessful by the end of the low tide cycle this date. The vessel owner did hire a local cleanup company to respond to the oil in the water as well as remove the fuel from the vessel's fuel tanks. Approximately 275 gallons of fuel was removed from the tanks.²

On 29 July 2014, the FOSCR determined that the best course of action was to request to open the Oil Spill Liability Trust Fund (OSLTF) to refloat the vessel and recover the remaining product in the vessel. The FOSCR noted that the vessel owner and crew had made multiple attempts to refloat the vessel but were financially unable to continue operations to the satisfaction of the Coast Guard and the vessel owner was issued a Notice of Federal Assumption. On 30 July 2014 Clean Harbors and OSM Marine were hired under a Federal Project Number (FPN) and was able to refloat the vessel.³

The Responsible Party (RP)

The Responsible Party for this incident has been identified by the Coast Guard as [REDACTED]. The Claimant presented this claim to Mr. [REDACTED] and the claim remains unpaid. Claimant asserts on its OSLTF Claim Form, item #5 that they presented their costs to the Responsible Party numerous times during July and August 2014.⁵ The National Pollution Funds Center (NPFC) also issued a Responsible Party Notification Letter to Mr. [REDACTED] on November 20, 2014 and to date no response to that notification has been received.⁶

¹ See USCG Case # 693182 / Activity Report # 4935115

² SITREP One, 31 July 2014

³ Id

⁴ See USCG Case # 693182 / Activity # 4935115

⁵ See OSLTF Claim Form dated October 24, 2014.

⁶ See NPFC RP Notification Letter dated November 20, 2014

The Claim & the Claimant

The Claimant, Newton B. Washburn Environmental Services, (NBW) presented a claim for its uncompensated removal costs in the total amount of \$4,424.66 for the services it provided in support of the DEMI LYNN vessel sinking and subsequent oil spill to the Oil Spill Liability Trust Fund (Fund) via the NPFC. The Claimant provided services to the Responsible Party from July 27, 2014 through August 1, 2014.⁷

APPLICABLE LAW:

Under OPA 90, at 33 USC § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into navigable waters and adjoining shorelines, as described in Section 2702(b) of OPA 90. A responsible party's liability will include "removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan". 33 USC § 2702(b)(1)(B).

"Oil" is defined in relevant part, at 33 USC § 2701(23), to mean "oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil".

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan and uncompensated damages. Removal costs are defined as "the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from an incident".

Under 33 USC §2713(b)(2) and 33 CFR 136.103(d) no claim against the OSLTF may be approved or certified for payment during the pendency of an action by the claimant in court to recover the same costs that are the subject of the claim. See also, 33 USC §2713(c) and 33 CFR 136.103(c)(2) [claimant election].

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

Under 33 CFR 136.105(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident. In addition, under 33 CFR 136, the claimant bears the burden to prove the removal actions were reasonable in response to the scope of the oil spill incident, and the NPFC has the authority and responsibility to perform a reasonableness determination. Specifically, under 33 CFR 136.203, "a claimant must establish -

- (a) That the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident;
- (b) That the removal costs were incurred as a result of these actions;
- (c) That the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC."

Under 33 CFR 136.205 "the amount of compensation allowable is the total of uncompensated *reasonable* removal costs of actions taken that were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. Except in exceptional circumstances, removal *activities* for which costs are being claimed must have been coordinated with the FOSC." [Emphasis added].

⁷ See OSLTF Claim Form dated October 24, 2014.

DETERMINATION OF LOSS:

A. Overview

1. MSTC [REDACTED] of Coast Guard Sector Southeastern New England (SENE) in his capacity as the Federal On Scene Coordinator's Representative (FOSCR) for this incident, determined that the actions undertaken by Newton B. Washburn Environmental Services, LLC (NBW) were consistent with the NCP. 33 USC 2702(b)(1)(B) and 2712 (a)(4);⁸
2. The incident involved the discharge of "oil" as defined in OPA 90, 33 USC 2701 to "navigable waters";
3. The Claimant states the costs were properly presented to [REDACTED] the Responsible Party, in July 2014, before being presented to the Fund.
4. In accordance with 33 CFR 136.105(e)(12), the claimant has certified no suit has been filed in court for the claimed costs.
5. In accordance with 33 USC 2712(h)(1), the claim was submitted within the six year period of limitations for removal costs
6. The NPFC Claims Manager thoroughly reviewed all documentation submitted with the claim and determined what costs presented were for actions in accordance with the NCP and the costs for these actions were reasonable and allowable under OPA and 33 CFR 136.205

B. Analysis:

NPFC CA reviewed the actual cost invoices and dailies to confirm that the claimant had incurred all costs claimed. The review focused on: (1) whether the actions taken were compensable "removal actions" under OPA and the claims regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of the actions; (3) whether the actions taken were determined by the FOSC, to be consistent with the NCP or directed by the FOSC, and (4) whether the costs were adequately documented and reasonable.

The Claims Regulations require that the Claimant present their costs to the Responsible Party (RP) prior to submitting their claim to the Fund.⁹ The Claimant alleged on the OSLTF Standard Claim Form that this claim was first presented to the RP in July or August 2014 and that the RP has not paid the costs. However, the invoice provided in support of this claim is dated 2 September 2014. Due to the invoice containing a date following when the Claimant asserted presentment had been made to the Responsible Party, the NPFC made a request for clarification from the Claimant regarding this issue. The Claimant advised the NPFC Claims Manager that they did not have a copy of the original invoice that was presented to the Responsible Party despite the Claimant's contention that they had presented it.

As such, the NPFC will adjudicate this claim to the extent that presentment requirements have been satisfied. If any damages or removal costs that are subject of this claim, were not first presented to the RP, the costs are denied for improper presentment.

Upon review and adjudication of the costs presented, the NPFC has determined that the majority of the costs billed were in accordance with the rate schedule that was in place at the time services were rendered. The Claimant provided a partial rate schedule to the NPFC via email on December 9, 2014 by Ms. [REDACTED] as one of the owners of NBW Environmental Services. Upon review of the invoicing, the NPFC found all pricing to be in accordance with the rate schedule with the exception of the following charges:¹⁰

- On 7/27/14 & 7/28/14 – the Claimant charged a \$400.00 transportation fee for the transport of 342 gallons of oily/water mix on 7/27/14 and again on 7/28/14 for the transport of 767 gallons of oily water which is not supported by a third party invoice or articulated in the rate schedule provided by the Claimant and as such, the fixed rate transportation fee charged on both days is denied in the amount of \$800.00 as unsubstantiated. The NPFC made an inquiry regarding these fees. The Claimant's response was that these

⁸ See Email from MSTC [REDACTED] to NPFC dated November 21, 2014.

⁹ 33 CFR 136

¹⁰ See Encl (1) NPFC Summary of Costs spreadsheet.

costs represented the costs of transporting materials to the disposal facility, that they are not included on the rate sheets. Claimant further asserts that these fees vary depending on what they are transporting and where they are transporting the materials. There is no evidence in the partial rate schedule provided that the Responsible Party was made aware such fees would be imposed, therefore, these costs are denied as unsupported by the record.

- On 7/28/14 – the Claimant charged the overtime hourly rate of \$43.88 for two truck drivers with a total of 8 hrs charged on this date. The ID# on the Claimant's rate schedule that correlates to the overtime rate permitted for a truck driver is \$29.25. Based on that information, the NPFC reduced the overtime rate from \$43.88 an hour to \$29.25 an hour resulting a total reduction of \$117.04 for improper billing.

All other pricing and actions were billed in accordance with the rate schedule at the time services were rendered and monitored by the Coast Guard in its capacity as the Federal On Scene Coordinator (FOSC) and are therefore approved as presented.

On that basis, the Claims Manager hereby determines that the Claimant did in fact incur \$3,507.62 of uncompensated removal costs and that that amount is payable by the OSLTF as full compensation for the reimbursable removal costs incurred by the Claimant and presented to the NPFC under claim #B14018-0001.

The Claimant states that all costs claimed are for uncompensated removal costs incurred by the Claimant for this incident from approximately July 27, 2014 through August 1, 2014. The Claimant represents that all costs paid by the Claimant are compensable removal costs, payable by the OSLTF as presented by the Claimant.

AMOUNT: \$3,507.62

Claim Supervisor:

Date of Supervisor's review: *1/15/15*

Supervisor Action: *Determination Approved*

Supervisor's Comments: